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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FOOTBALL LEAGUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Is the Federal Communications Commission obliged, in regulating cable television, to reflect the national policy expressed in Public Law 87-331 that professional sports leagues are entitled to control the pattern of television broadcasts of their games in order to promote equal access to television exposure by member teams and to protect gate receipts and game attendance from undue damage from telecasts of NFL games, notwithstanding that Public Law 87-331 is not part of the Communications Act?*

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* The following parties were either petitioners or intervenors aligned with petitioners in the court below: The National Association of Broadcasters; Hubbard Broadcasting, Inc.; Midwest Television, Inc.; Post-Newsweek Stations, Inc.; John Blair & Company; Malrite T.V. of New York, Inc.; McGraw-Hill Broadcasting Company, Inc.; American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc.; Association of Independent Television Stations, Inc.; Field Communications Corporation; Metromedia, Inc.; Commissioner of Baseball; National Basketball Association; National Hockey League; National Football League; Taft Broadcasting Company; Storer Broadcasting Company; Springfield Television Corporation; Delta Television Corp.; Evans Broadcasting Corp.; Gaylord Broadcasting Company; Jet Broadcasting Company, Inc.; Motion Picture Association of America; Omega Communications, Inc.; Cedar Rapids Television Co.; Gilmore Broadcasting Corp.; Jefferson-Pilot Broadcasting Co.; Jefferson-Pilot Broadcasting Co. of Virginia; KHQ, Inc.; KTVE, Inc.; WALB-TV, Inc.; WJHG, Inc.; Bahia de San Francisco Television Co.; Forward Communications Corporation; Futura Communications Corporation; Guaranty Broadcasting Corporation; John H. Phipps Broadcasting Stations, Inc.; K-Six Television, Inc.; May Broadcasting Co.; Park Broadcasting Inc.; Plains Television Corp.; Ralph C. Wilson Industries, Inc.; Retlaw Enterprises, Inc.; Service Broadcasters, Inc.; Seven Hills Television Co., Inc.; Southern Television Corp.; Spanish International Communications Corp.; Studio Broadcasting System Division of Highwood Service, Inc.; Summit Radio Corporation; Telecorpus, Inc.; WICS-TV, Inc.; Wilson Communications, Inc.; Winnebago Television Corp.; WIXT Television,

Inc.; WKRG-TV, Inc.; Ziff-Davis Broadcasting Company; and Tribune Company.

Respondents in the court below were the Federal Communications Commission and the United States of America. Aligned with respondents in the court below were intervenors National Cable Television Association, Inc.; Community Antenna Television Association, Inc.; Allen's TV Cable Service, Inc.; United Video, Inc.; American Video Corp.; Asbury and James TV Cable Service; Audubon Electronics, Inc.; Better Cable TV; Brownwood TV Cable Service, Inc.; Cablevision of Pennsylvania, Inc.; Cass Community Antenna TV; CATV General Corporation; Central Communications Corp.; Chattanooga Cable TV Co.; Clearview Cable Corp. of South Carolina; Community Cablevision Corp.; Coosa Cable Company; Corsicana Cable TV Co.; Daniels Properties, Inc.; Dorate, Inc.; Greater Media, Inc.; Harmon and Company; Hawaiian Cable Vision Corp.; Hill City Cable TV Company; Hurley Cable TV, Inc.; Intertie, Inc.; Lakeview TV, Inc.; Landmark Cablevision Associates; Lynn County CATV, Inc.; Maine Cable Television, Inc.; McDonald Group, Inc.; Pearson Cable TV Antenna System, Inc.; Piggott Video Cable, Inc.; Pinebelt Cablevision, Inc.; Rockford Cablevision, Inc.; Schuylkill Valley Trans-Video Corp.; Shen-Heights TV Associates, Inc.; Snyder Community Antenna Television, Inc.; Sweetwater Television Co.; Telecommunications, Inc.; Television Enterprises, Inc.; Tele-View, Inc.; TOCOM, Inc.; Total Television, Ltd.; Transcable, Inc.; Twin County Trans-Video, Inc.; UA-Columbia Cablevision, Inc.; United Cable Television Corporation; Valley Antenna Systems, Inc.; Vandalia Cable TV Co., Inc.; and Wood River Cable-Vision, Inc.

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The National Football League prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case, styled below as *Malrite T.V. of New York, Inc., et al.* v. *Federal Communications Commission, et al.*, on June 16, 1981, denying petitions to set aside a Report and Order of the Federal Communications Commission in Docket Nos. 20988 and 21284 which repealed certain cable television regulations.

OPINIONS BELOW

The opinion of the court of appeals is reported at —— F.2d —— and is reproduced as Appendix C to the petition of the National Association of Broadcasters (hereinafter "NAB Pet."). The Report and Order of

the Federal Communications Commission is reported at 79 F.C.C.2d 663 and is reproduced in NAB Pet. Supplemental App.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1981. *See* NAB Pet. App. C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Public Law 87-331, as amended, 15 U.S.C. §§ 1291-95 (1976), is set forth in the Appendix to this Petition. Sections 76.57-.63 of the cable television regulations of the Federal Communications Commission in effect before entry of the judgment of the court of appeals, 47 C.F.R. §§ 76.57-.63, are set forth in NAB Pet. App. B.

STATEMENT OF THE CASE

Cable Television

So far as relevant here, cable television (or CATV) systems take television broadcast signals, amplify them, and distribute them through cables to subscribing homes. These systems perform two services: improving reception of "local" television stations in homes that might not otherwise receive clear signals through conventional antennas, and importing "distant" television signals which could not otherwise be received in the area in which the system is located. (Cable systems also originate various kinds of programming, but this activity is not involved in this case.)

The Federal Communications Commission's regulation of cable importation of distant signals has primarily involved striking a balance between increasing viewer options and not unduly undermining the viability of local television broadcast service. In its distant signal rules, adopted in 1972, the Commission attempted to strike this

balance by restricting the number and type of distant signals cable systems were allowed to carry along with local signals, which were required to be carried. In general, systems could carry distant signals which, when added to local signals, would provide subscribers with the programming of the three commercial television networks, and, depending on the size of the market, one to three independent (non-network) stations. In addition, one or two extra independent stations could be imported in certain situations. 47 C.F.R. §§ 76.57-.63; NAB Pet. App. B.

Last year, however, the Commission decided, after lengthy rulemaking proceedings, to eliminate these distant signal rules altogether. Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C.2d 663 (1980); NAB Pet. Supp. App. This decision was stayed by the Second Circuit to hear an appeal by various broadcasters, professional sports leagues, including the National Football League (NFL), and other program suppliers. Upon the Second Circuit's decision (NAB Pet. App. C) to affirm the FCC's Report and Order—the decision of which we seek review here—the stay expired, and the distant signal rules outlined above are no longer in effect.

This means that cable systems will be authorized to import as many distant signals, of whatever kind, as the systems wish and are financially and technically able to carry.

Cable television is big business. An estimated 19 million homes now subscribe to cable, and that figure is expected to double by 1985. Industry revenues exceeded $1.5 billion in 1978. Major multiple-system operators include Time, Inc., American Express, Westinghouse, The Times-Mirror Company, Warner Communications, The New York Times and Dow Jones.

The availability of otherwise unviewable sports telecasts has always been a prime attraction of cable systems, particularly now, with satellite transmission of stations that feature heavy sports programming.[1] Thus far, this has not generally included NFL games. The reason is that, except for a few pre-season exhibition games, all NFL games are telecast over one of the three commercial television networks, and the Commission's distant signal rules forbade importation of distant network stations in all but the smallest television markets.

NFL Television Patterns

NFL television contracts have always been based on two principles. One is to give each team approximately equal television exposure (and equal revenue) and, in particular, to require the networks to televise each team's away games back to its home territory, notwithstanding that the networks might prefer to televise only a few, more attractive games. The second is to maintain primary emphasis on attracting fans to the stadium, and keep the sport from becoming "studio" entertainment, by limiting the extent to which games are available on television within a team's home territory when the team is playing at home.

In 1961, Congress specifically endorsed these principles when it enacted Public Law 87-331, as amended, 15 U.S.C. §§ 1291-95 (1976). The 1961 statute exempted from the antitrust laws a type of contract by which member clubs of a professional sports league pooled their television rights and sold them to a single television network. The specific contract between the NFL and CBS that was before the Congress had two key features: It prohibited the network from telecasting

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[1] Among the most popular distant stations on cable are WTBS, Atlanta, WPIX and WOR, New York, and WGN, Chicago. During 1981, these four stations were scheduled to televise 569 major league baseball games.

any games into the home territory of any NFL team—roughly, an area extending 75 miles around the home city—on a day when the team was playing a home game; and it required the network to telecast each team's away games back to the team's home territory. And, of course, because the network had no more than one affiliated station in a television market, no more than one NFL game could be telecast in any market. The Judiciary Committees of the Senate and the House both recognized that the two television principles described above were in the public interest and important to the success of the NFL. They accepted the concept that a pooled contract would enable the NFL to implement these television principles, H.R. Rep. No. 1178, 87th Cong., 1st Sess. at 2-3 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. at 2-3 (1961), and the statute expressly preserved the right of member clubs to control telecasts within the home territory when a team was playing at home, 15 U.S.C. § 1292.[2]

Thus, the concept of having a balanced league, giving each team roughly equal television exposure and equal television revenue, and allowing teams to limit the potential for television injury to ticket sales and game attendance, was found by Congress to be in the public interest and worthy of express exemption from the antitrust laws.

Although two networks now carry the games of the expanded NFL on Sundays (and the third network carries games on Monday evenings and at other special times), NFL television patterns continue to reflect this

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[2] A district court had ruled that a pooled contract, because it would give the network too much control over which game would be telecast in which city, would violate a decree entered by the court in an earlier antitrust suit. United States v. National Football League, 196 F.Supp. 945 (E.D. Pa. 1961). In the earlier case, the court had ruled, on the other hand, that joint restrictions on telecasts within a team's home territory when the team was playing at home were reasonable and not a violation of the Sherman Act. *Id.*, 116 F.Supp. 319 (E.D. Pa. 1953).

concept. Each game is televised back to the home territory of the visiting team, and two other games are generally also telecast in the same areas. In the home territory, when a home game is played, two games are usually telecast, but this does not include the home game itself (unless it was sold out 72 hours before kickoff).[3]

The Potential Impact of Cable Television

Cable television, if not suitably regulated, threatens substantial injury to this concept. There is no technological limit to the ability of cable television systems to "import" into any city multiple television signals from anywhere in the country. If not restricted by regulation, a cable system could therefore bring into an NFL team's home territory, when the team is playing a home game on a Sunday, every NFL game being played that day. (Cable systems' advertising has always trumpeted the availability of additional sports telecasts.) The team would then face the prospect of attempting to sell tickets to fans who could watch up to a dozen NFL games on television instead of the two games now allowed by the NFL television contracts. Moreover, the networks are likely to resist bringing every team's away games back

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[3] Originally, NFL clubs allowed no NFL game telecasts in their home territory when they were playing home games, but this was relaxed in 1965 on an experimental basis and now is a permanent fixture. Even so, the clubs limit to two the number of games telecast in the home city in such cases, and potential injury to ticket sales and game attendance is further limited by specifying that one of the telecast games be one that starts earlier or later than the home game.

NFL clubs never allowed the home game itself to be televised into the home territory, but in 1973 Congress forced a change in this practice as to sold-out games. *See* Public Law 93-107, formerly codified as 47 U.S.C. § 331. Although this law expired at the end of 1975, the NFL has voluntarily continued to observe the law's requirements and study its effects.

to its home territory (at considerable cost to the network) when such games have to compete for audience with up to eleven other televised games instead of only two.

The NFL and other professional sports interests have repeatedly brought these concerns to the attention of the FCC. They have urged that the Commission is obliged to give full recognition to what Congress did in 1961: allowing professional league sports virtually complete control over their television patterns in order to keep the fans coming to the stadium and to prevent a minority of teams from monopolizing television coverage in the nation.[4] In the proceeding at issue here, professional sports interests asked that the FCC not abandon its distant signal rules or that it adopt a rule requiring cable systems to obtain the consent of the program producer before retransmitting certain types of programs. The Commission, however, ignored the unique situation of professional team sports and decided that "sports programming should stand on the same footing as all other programming." (Report and Order ¶ 322, 79 F.C.C.2d at 811). The Commission thus declined to recognize the special status which Congress conferred upon profes-

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[4] Thus far, the only FCC acknowledgment of Public Law 87-331 was in a 1975 rule which prevents cable systems from importing into a 35-mile area around an NFL city (not the 75-mile home territory used by the NFL for decades and accepted by Congress) a telecast of the home game itself. 47 C.F.R. § 76.67; *see* Report and Order in Docket 19417, 54 F.C.C.2d 265 (1975). In view of the recently expressed attitude of the FCC toward "deregulation" in general and toward allowing unlimited growth of cable, it is very uncertain whether even this limited restriction will remain on the books for long. Indeed, the Commission's attitude toward sports as being just another form of television programming strongly indicates that this "home game" rule is targeted for prompt elimination.

sional sports telecasting by the enactment of Public Law 87-331. The Second Circuit affirmed without ever mentioning the statute.

REASONS FOR GRANTING THE WRIT

The precise issue presented by this petition is a simple one: whether the Federal Communications Commission is obliged to reflect in its decisions the totality of congressional declaration of national television policy, or whether, on the other hand, the Commission is free to ignore congressionally declared television policy which is not contained in the Communications Act and which bears on the nature of professional team sports rather than on the welfare of the television industry. The issue can be stated in broader terms: To what extent must an administrative agency pay heed to congressional declarations of policy which relate to the subject matter the agency is constituted to administer but which are not contained in the agency's organic statute?

With one possible exception, we are aware of no case in which this Court has addressed this important question. Nor has the Court ever construed Public Law 87-331, the statute on which we rely.[5]

It is true that the Court has dealt with a related question, namely, whether an agency's organic statute permits or requires the agency to take account of a sweeping national policy, such as preventing employment discrimination, promoting competition, or protecting the environment. Thus, in *NAACP* v. *FPC*, 425 U.S. 662 (1976), the Court held that the Federal Power Commission may concern itself with discriminatory employment practices by the companies it regulates. This decision, however, was

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[5] The statute is mentioned but not discussed in Flood v. Kuhn, 407 U.S. 258, 281-82 (1972).

based upon the Commission's power to establish "just and reasonable" rates for electrical energy and natural gas and upon the view that unnecessary or illegal costs which result from discriminatory practices arguably should not be passed on to consumers. The Court rejected a broader contention based upon the statutory declarations that the electric and gas business are "affected with the public interest," holding (as it had previously) that these words in a regulatory statute do not give an agency "broad license to promote the general public welfare." 425 U.S. at 669. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), the Court held that the ICC was required to consider the competitive effect of a merger of truckers but to do so in the light of the objectives of the agency's organic statute. In *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, on the other hand, the Court held that the Secretary of HUD need not prepare an environmental impact statement with respect to a planned subdivision that was the subject of a disclosure statement the developer was required to file under the Interstate Land Sales Full Disclosure Act, but again the decision turned on construction of the Act, which makes a disclosure statement effective on the thirtieth day after filing, too little time to prepare an impact statement.

In this case, however, we do not rely on the Communications Act to support giving professional sports leagues control over their telecast patterns.[6] Nor do we contend that the FCC has a "broad license to promote the general public welfare." Instead, the statutory basis for our position is Public Law 87-331, which, although

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[6] Except, of course, insofar as the Act gives the Commission authority to regulate cable television. *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

codified among the antitrust laws, deals directly with television. It says that the producers of certain types of entertainment are different from all other entertainment producers, enough so to warrant that rarest of congressional actions, an exemption from the Federal antitrust laws. Congress weighed the interests of professional sports teams in controlling their telecast patterns and found these interests worthy of approval, rather than leaving the determination of which games would be seen in which cities to be left to the ordinary process of the marketplace. Congress endorsed as a public good the NFL's policy of allowing last year's last place team to have television exposure and television revenue equal to last year's champion, and of not allowing the proliferation of game telecasts to injure ticket sales and attendance at the stadium.

The one case that is arguably in point here is *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31 (1942). The Labor Board has discretion to fashion appropriate remedies when it finds that an employer has committed an unfair labor practice, and ordering reinstatement of employees who strike and are replaced is a typical remedy. In this case, however, the employees were seamen, and a strike by seamen is mutiny, a serious crime. The Court held that the Board abused its discretion when it ordered reinstatement of the mutineers:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." 316 U.S. at 47.

The error the FCC committed in the course of repealing the distant signal rules was to ignore totally the policy expressed in Public Law 87-331. The Commission focused almost entirely on whether elimination of the rules would cause undue competitive injury to television stations, a matter on which the professional sports leagues took no position. Nowhere did the Commission refer to the NFL's plea that it be allowed to continue the control over its telecast patterns which it enjoyed under Public Law 87-331 before the growth of cable television. The sole reference to sports programming, contained in six paragraphs (out of 333) in its *Report and Order*, comes down to the Commission's assertion that it did not believe "the general amount of televised sports events has been or will be seriously diminished." (Report and Order ¶ 320, 79 F.C.C.2d at 809-10). This assertion simply does not respond to the principal contention made by the NFL. Nor did the Second Circuit, in its decision upholding the Commission, address the impact of Public Law 87-331.

Televising of professional sports is an important feature of American life. The NFL has developed policies designed to balance the interest in wider viewing of NFL games against the interest in having balanced teams playing before live fans. Congress has endorsed those policies, but the FCC, the agency with power to effectuate those policies in its cable television rules, has ignored what Congress said. This Court should review the decision below in order to address the question of the Commission's responsibility to heed a statute which expresses an important national television policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 14, 1981

APPENDIX

APPENDIX

Public Law 87-331, 15 U.S.C. §§ 1291-95

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CHAPTER 32—TELECASTING OF PROFESSIONAL SPORTS CONTESTS

Sec.

1291. Exemption from antitrust laws of agreements covering the telecasting of sports contests and the combining of professional football leagues.

1292. Area telecasting restriction limitation.

1293. Intercollegiate and interscholastic football contest limitations.

1294. Antitrust laws unaffected as regards to other activities of professional sports contests.

1295. "Persons" defined.

§ 1291. Exemption from antitrust laws of agreements covering the telecasting of sports contests and the combining of professional football leagues

The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [15 U.S.C. 12], or in the Federal Trade Commission Act, as amended (38 Stat. 717) [15 U.S.C. 41 et seq.], shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement

by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of the Internal Revenue Code of 1954 [26 U.S.C. 501(c)(6)], combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

• • • •

§ 1292. Area telecasting restriction limitation

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

• • • •

§ 1293. Intercollegiate and interscholastic football contest limitations

The first sentence of section 1291 of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate or interscholastic football contest scheduled to be played on such a day if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, or

(2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses continuing through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such game site were announced through publication in a newspaper of general circulation prior to August 1 of such year as being regularly scheduled for such day and place.

* * * *

§ 1294. Antitrust laws unaffected as regards to other activities of professional sports contests

Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.

* * * *

§ 1295. "Persons" defined

As used in this chapter, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

* * * *